FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

December 20, 1999

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE SOUTH WILLOW CREEK FARM, Debtor.	BAP No. UT-99-052
SOUTH WILLOW CREEK FARM, Appellant, v. SOUTH WILLOW CREEK, L.L.C.; BRUCE GILDEA; PAUL E. CLARK; MILTON CRAIG GILES; and JOEL T. MARKER, Trustee, Appellees.	Bankr. No. 99-25921 Chapter 12 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Utah

Before McFEELEY, Chief Judge, BOHANON, and ROBINSON, Bankruptcy Judges.

BOHANON, Bankruptcy Judge.

This court, with the consent of the parties, has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1). Under this standard, we have jurisdiction over this appeal. The parties have consented to this court's jurisdiction in that they have not opted to have the appeal heard by

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

the United States District Court for the District of Utah. Id.§ 158(c); 10th Cir. BAP L.R. 8001-1(a) and (d). The appeal was filed timely by the debtor, and the bankruptcy court's order is "final" within the meaning of § 158(a)(1). *See* Fed. R. Bankr. P. 8001-8002.

The Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree, or remand with instructions for further proceedings. Fed. R. Bankr. P. 8013. "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." Pierce v. Underwood, 487 U.S. 552, 558 (1988). This decision is reviewed for an abuse of discretion.

The issue on appeal is whether the bankruptcy court erred in reducing the time for a hearing on the Appellee's motion to dismiss the petition and denying the Appellant's request to continue the hearing. The hearing was conducted on the reduced notice and the petition was dismissed.

The facts are not in dispute. We conclude that the court abused its discretion and we reverse and remand.

FACTS

South Willow Creek Farm ("Debtor"/Appellant) and South Willow Creek L.L.C. ("Appellee") have a long history of litigation in both the bankruptcy court and in the Utah state courts.[1] All of the litigation focuses on which of these two parties has legal title to property that consists of a home and six acres, an

[1] Following the arguments the appellee submitted a copy of the state court Amended Order concerning this dispute, which was not entered by that court until after the arguments. The Debtor objected to the Court's consideration of this order. We grant the objection. The order is not part of the record and is not certified as correct. See Fed. R. Evid. 902(4). Additionally, the order does not appear to be final. Since the matter is to be remanded the bankruptcy court can consider the effect of this order at the hearing.

additional fifty-five adjoining acres, and sixty-two water shares ("Property").[2] The Utah state court held that the Debtor or its partners had until May 30, 1999 to purchase the Property or title would be quieted in the Appellees. On the eve of expiration of the period, May 28, 1999, the Debtor, alleging that it was a partnership and so entitled to seek relief under Chapter 12 of the Bankruptcy Code, filed a petition under that chapter. The Debtor filed the petition without the accompanying schedules and statement of affairs. The bankruptcy court granted the Debtor additional time to prepare these items.

The case then languished until June 22, 1999, when the Appellees filed a Motion to Dismiss the Chapter 12 Bankruptcy ("Dismissal Motion") together with an ex parte Motion for an Expedited Hearing ("Expedited Hearing Motion"). The Expedited Hearing Motion requested service on less than all the creditors and service by facsimile on the Debtor's attorneys. The court granted the Expedited Hearing Motion over the strenuous objections of the Debtor and set the hearing for three days later, on June 25, 1999. The court also approved service upon less than all the listed creditors.

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[2] In 1997, an action was filed in the Sixth Judicial District Court of Sanpete County, Utah, to quiet title to the above named Property. Bernon and Janice Neal and their son Michael ("Neals") were in possession of the land and water, despite the Appellees' purchase of those assets in April 1995. The Appellees claimed that the Neals had been wrongfully in possession of the Property since the latter part of 1996. On March 1, 1999, the district judge ruled that the Neals and the Steenbliks ("Defendants") would have until May 30, 1999, to exercise an option to acquire the Property. He further ruled that this option was not a vested interest in the property but was contingent on performance. On or about April 30, 1999, the Defendants filed a docketing statement in the Utah Supreme Court. On June 3, 1999, the Appellants filed a Motion for Summary Judgment based on the lack of a final order in the case.

On June 2, 1999, Steenblik filed a Notice to Stay Proceedings in the Sixth District Court, alleging that he had filed a Chapter 12 reorganization bankruptcy. Subsequently, the Appellants filed a Motion for Rule 11 Sanctions in the state court action against the Defendants because of the misleading Notice, on the ground that the Chapter 12 bankruptcy had been filed by South Willow Farms, not Steenblik. Steenblik also filed a Response to the Motion for Summary Disposition in which he stated that "Steenblik on behalf of Appellant's [sic] has filed a Chapter 12 reorganization."

The Debtor filed a Motion to Continue the June 25th Date ("Continuance Motion") on the grounds that Debtor's counsel did not have sufficient time to prepare for the hearing and that Debtor's counsel had scheduling conflicts. The court denied the Continuance Motion. At the June 25th hearing, Debtor's counsel made a second oral motion for a continuance based on the lack of time in which to prepare, as well as on the ground that the Appellee had not provided all parties in interest, specifically, all of the creditors, with notice. Again, the motion was denied. At the conclusion of the hearing, the bankruptcy court found that the Debtor was not a partnership and, therefore, not a "person" qualified to file a Chapter 12 petition, and the petition was dismissed.

A Notice of Appeal was filed on July 2, 1999. On July 6, 1999, the bankruptcy court entered its Order of Dismissal, making the Notice of Appeal effective as of July 6, 1999, pursuant to Rule 8002(a) of the Federal Rules of Bankruptcy Procedure.[3]

DISCUSSION

Our decision turns on two of the Federal Rules of Bankruptcy Procedure. Bankruptcy Rule 2002(a)(4) stipulates how much notice interested parties shall receive of a pending hearing in a bankruptcy matter. Specifically, Rule 2002(a)(4) provides the following:

> [T]he clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days notice by mail of:
> . . .
> (4) in a . . . chapter 12 family farmer debt adjustment case,

[3] Several additional motions were disposed of in this case prior to our hearing this appeal. On July 16, 1999, Debtor filed in this Court a Motion to Stay Bankruptcy Court Proceedings as well as an Emergency Motion for Stay of Proceedings ("BAP Stay Motions"). This Court denied those Motions without prejudice based on the Debtor's failure to comply with Rule 8005. On August 2, 1999, Debtor filed in the bankruptcy court an Emergency Motion for Stay of Proceedings Nunc Pro Tunc. The bankruptcy court denied that motion. On August 17, 1999, the Debtor filed with this Court an Emergency Motion for Stay of Proceedings Nunc Pro Tunc, which we denied on August 20, 1999.

> the hearing on the dismissal of the case . . . .

Fed. R. Bankr. P. 2002(a)(4).

However, the Bankruptcy Rules also grant the bankruptcy court discretion to modify this twenty-day time period. Bankruptcy Rule 9006(c)(1) states:

> [W]hen an act is required or allowed to be done at or within a specified time by these rules or by a notice given thereunder or by order of the court, the court for cause shown may in its discretion with or without motion or notice order the period reduced.

Fed. R. Bankr. P. 9006(c)(1).

The only reason given by the Appellees in their Expedited Hearing Motion for an emergency hearing was that the "[m]ovants believe that the Debtor will continue to harvest the crops and use the proceeds thereon for the sole benefit of the [Debtor's partners]." The court's order granting the Appellee's Expedited Hearing Motion, and denying the Debtor's Continuance Motion contained no specific finding of fact to support a conclusion of cause. Moreover, at the hearing, the court merely concluded "[t]hat motion [to continue the hearing] is denied. The Court has the authority to reduce the time for notice under Rule 2002." There was no evidence offered to show that the Debtor was actually preparing to harvest the crop; that the Debtor was not entitled to harvest the crop; when the crop would be ready for harvest; that the Debtor or its partners had wrongfully harvested crops on the land in the past; that it was not in the best interest of all the partners to harvest the crop when it was ready; or that the crop proceeds couldn't somehow be segregated until proper notice could be provided.

The following factors are important in this court's decision. First, we note that the twenty-day notice period can be reduced only "for cause shown." Fed. R. Bankr. P. 9006(c)(1). Here, little cause was shown in the Expedited Hearing Motion. The Appellees did not provide the bankruptcy court with any evidence to support this motion, but merely alleged their *concern* that the crop would be

harvested. Additionally, the court, in denying the Debtor's motion for continuance, made no finding of cause. Furthermore, there was no evidence offered that would indicate any cause for the drastic reduction. A reduction of time is akin to a temporary restraining order in that it often operates *ex parte* and affects the absent party's rights to a significant degree.

We conclude that for a reduction, especially one of this drastic nature, the moving party must provide evidence in its motion that if the motion is not granted there is a danger of irreparable harm or clear prejudice to the moving party. Before the motion may be granted, the court must make specific findings based on facts in the record. These factors were not present in this case.

Additionally, we observe that in this case, the apparent cause for the reduced notice was due to delay by the Appellees. They waited three weeks to bring the Dismissal Motion and then sought the drastic reduction. The fact that they had time to serve the Dismissal Motion within the twenty-day requirement is a consideration.

A second factor we weighed is that the subject of the Expedited Hearing Motion was a Dismissal Motion. A motion to dismiss is obviously dispositive. If the motion had been of some other nature, such as a motion seeking administrative or temporary relief, we might not read the rule as strictly. However, where the ultimate disposition of the motion may result in the termination of a case, strict adherence to the notice requirement is more significant.

It is also important that the hearing on the Dismissal Motion was lengthy. The transcript of the hearing consumes approximately 140 pages; three witnesses were examined, and ten exhibits were offered. Obviously Debtor's counsel required preparation time. Even though Debtor's counsel already may have been familiar with some of the witnesses and documents, they had little or no time for

preparation. Again, the circumstances might be different if the motion had requested relief of a non-dispositive nature and the issue did not require evidence but merely legal arguments. At the very least, counsel for the Debtor should have been afforded some time for preparation and minimal discovery. Counsel also should be afforded the reasonable opportunity to prepare her own clients in the event they are to be called to testify. Again, these concerns become more significant when the relief sought in the motion is dispositive of the case.

It also appears that Debtor's counsel is new to the longstanding dispute between the Debtors and Appellants, and most of the evidence concerns events surrounding the history of their relationship. It is not as if counsel was already familiar with the facts of the inquiry.

Appellees rely on the language of 11 U.S.C. § 102(1), which construes the phrase "after notice and hearing" to be "notice as is appropriate in the particular circumstances." We simply cannot conclude that, under these facts, three days notice for a dispositive motion is appropriate.

The landmark case on the issue of due process of law regarding adequate and fair notice is Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). There the Court said:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."

Mullane, 339 U.S. at 314 (citations omitted) (quoting American Land Co. v. Zeiss, 219 U.S. 47, 67 (1911)).

Here, we are unable to agree that the circumstances of the case, considering these factors, justified reducing the time to a mere three days.

The Court of Appeals for this circuit has also dealt with the issue, in the bankruptcy context, in Reliable Electric Co., Inc. v. Olson Construction Co., 726 F.2d 620 (10th Cir. 1984). There it quoted the same language from Mullane in a case where a creditor did not receive constructive notice of a reorganization case. This decision makes it plain that the due process requirements, as explicated in Mullane, apply in bankruptcy cases.

In the event the South Willow Creek Farm bankruptcy petition is false and there is no partnership, or no justifiable reason on part of the Debtor to believe there may be one, and the court concludes it was filed for an improper purpose, Rule 9011 of the Federal Rules of Bankruptcy Procedure provides the means for awarding appropriate sanctions against Debtor or its counsel.

CONCLUSION

We simply are unable to conclude that under the circumstances of this case the three-day notice satisfies the due process requirements.

Accordingly, the order dismissing the petition is REVERSED and the case REMANDED for a hearing on notice that satisfies the requirement of fairness and is adequate to allow reasonable time for preparation.